Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-470

NATHAN PORTNER,

Petitioner,

vs.

COMMUNITY STATE BANK AND TRUST COMPANY, a New Jersey Corporation; KARL ASCH, former Union County Prosecutor; HOWARD FRANKEL, MICHAEL J. MITZNER; J. MICHAEL BREEN; GLENN OWEN; THOMAS J. BADER, also known as T. J. BADER, PEGGY FITZ; LEO KAPLOWITZ; LLOYD HARRIS; ARTHUR. R. CROUCHER; JOHN C. GIORDANO, JR.; SEYMOUR GOLDBERG; THEODORE LEY; JOSEPH RESNICK; FRED ROTHSCHILD; SANFORD H. SALZ, MAX SALDOWSKY and BERNARD ZIENTS,

Respondents.

Brief and Appendix in Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

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The respondents, Karl Asch, Michael J. Mitzner, J. Michael Breen and Glenn Owen, respectfully request that the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be denied.

OPINION BELOW

The letter opinion of the Honorable Frederick B. Lacey of the United States District Court for the District of New Jersey appears in the Appendix hereto along with the judgment entered. The judgment of the Third Circuit Court of Appeals also appears in the Appendix hereto. In affirming Judge Lacey's decision, Judges Rosenn, Hunter and Higginbotham of the Third Circuit Court of Appeals did not issue an opinion.

JURISDICTION

The petitioner, Nathan Portner, has invoked the jurisdiction of the court under 28 U.S.C. §1254(1).

COUNTER-STATEMENT OF THE ISSUES PRESENTED

1. Where a prosecutor and his staff act within the jurisdiction of the prosecutor's office, does such prosecutor and staff enjoy absolute immunity?

2. Once it has been determined that a prosecutor and his staff have acted within the jurisdiction of the prosecutor's office and are therefore absolutely immune from suit, is it the proper course of action for a United States District Court to dismiss the complaint pursuant to F.R.C.P. 12(b)?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

Section 1254. Court of Appeals; Certiorari; Appeal, Certified Questions.

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any part to any civil or criminal case, before or after rendition of judgment or decree; . . ."

United States Code, Title 42:

Section 1983. Civil Action for Deprivation of Rights.

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."

F.R.C.P. 12(b):

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matter outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

F.R.C.P. 52(a):

> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The finds of a master, to the extent that the court adopts them, shall be considered as the finds of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

COUNTER-STATEMENT OF THE CASE

Respondent, Karl Asch, former Union County Prosecutor and respondents, Michael J. Mitzner, J. Michael Breen and Glenn Owen, employees in the office of the Union County Prosecutor, were notified in June of 1974 by authorities of the Community State Bank that a bribe had allegedly been offered by the petitioner, Nathan Portner (hereinafter referred to as "Portner"), to a bank employee in exchange for a confidential bank document. In response to this notification, the respondents pursued this charge and eventually arrested Portner and his son, Steven Portner. A formal criminal complaint was not filed against Steven Portner, but one was filed against Portner.

When the case came up before the Union County Grand Jury, said jury failed to return an indictment against Portner. As a result, the Union County Assignment Judge dismissed the criminal complaint. Portner then commenced the present suit for damages under 42 U.S.C. §1983. Portner alleged that the respondents violated his Fourth, Fifth, Sixth and Fourteenth Amendment rights under the Constitution. Portner alleged that the Community State Bank and several bank employees conspired with an employee of the prosecutor's office to entrap him and to unlawfully record a conversation between him and a bank employee for the purpose of showing that he had attempted to pay an illegal bribe to said bank employee. Portner charged the respondents, Breen and Owen, with illegal arrest, assault and battery and unlawful detention. Portner alleged that the respondent, Mitzner, had advised him that if he entered a plea of guilty, he would be charged with a disorderly persons offense, but if he refused, both he and his son would be charged with the commission of a "High Misdemeanor." Finally, Portner alleged that when he refused to enter a

plea of guilty, he was charged with such a "High Misdemeanor."

Pursuant to a motion brought under F.R.C.P. 12(b), the Honorable Frederick B. Lacey of the United States District Court for the District of New Jersey dismissed Portner's complaint for a failure to state a claim upon which relief can be granted. Judge Lacey held that the Union County Prosecutor and his staff were immune from suit under 42 U.S.C. §1983, and, therefore, the action against the Community State Bank and its employees could not be maintained. Portner appealed to the United States Court of Appeals for the Third Circuit. Judge Rosenn, Hunter and Higginbotham of that court affirmed Judge Lacey's decision without opinion.

REASONS FOR DENYING THE WRIT

Point I

Where the prosecutor and his staff act within the jurisdiction of the prosecutor's office, such prosecutor and staff enjoy absolute immunity.

Any discussion of the immunity status of a prosecutor and his staff must of course begin with the United States Supreme Court case of *Imbler v. Pachtman,* 424 U.S. 409 (1976). In that case, the Supreme Court considered the specific question of whether or not a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution is amenable to suit under 42 U.S.C. §1983 for alleged deprivations of the defendant's constitutional rights. In holding that a prosecutor is immune from such a suit, the Supreme Court stated that:

> "The common-law rule of immunity [of a prosecutor] is thus well settled. We now must determine whether the same considerations of public policy that underlie the common-law rule likewise countenance *absolute immunity under §1983. We think they do.*
>
> If a prosecutor had only a qualified immunity, the threat of §1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment, both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. Cf. *Bradley v. Fisher,* 13 Wall, at 348; *Pierson v. Ray,* 386 U.S. at 554. Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law" (emphasis added). 424 U.S. at 424, 425.

The Supreme Court went on to note that the ultimate fairness of the operation of the criminal justice system could be weakened if prosecutors were made subject to §1983 liability. The court concluded that:

> ". . . the considerations outlined above dictate the same *absolute immunity under §1983* that the prosecutor enjoys at common law" (emphasis added). 424 U.S. at 427.

The doctrine of Imbler, *supra* that a prosecutor enjoys absolute immunity from §1983 suits for damages when he acts within the scope of his prosecutorial duties has long been recognized in the Third Circuit, *United States ex rel. Moore v. Koelzer,* 457, F.2d 892 (3rd Cir. 1972); *United States ex rel. Rauch v. Deutsch,* 456 F.2d 130 (3rd Cir. 1972); *Bauers v. Heisel,* 361 F.2d 581 (3rd Cir. 1966) (*en banc*), *cert. denied* 386 U.S. 1021 (1967); as well as in the other circuits, *Palermo v. Warden, Green Haven State Prison,* 545 F.2d 850 (2nd Cir. 1976); *Hilliard v. Williams,* 540 F.2d 220 (6th Cir. 1976); *Tyler v. Witkowski,* 511 F.2d 449 (7th Cir. 1975); *Barnes v. Dorsey,* 480 F.2d 1057 (8th Cir. 1973); *Flood v. Harrington,* 532 F.2d 1248 (9th Cir. 1976); *Taylor v. Nichols,* 558 F.2d 561 (10th Cir. 1977); *Cf. Guerro v. Mulhearn,* 498 F.2d 1249 (1st Cir. 1974); *Weathers v. Ebert,* 505 F.2d 514 (4th Cir. 1974.

In *Cambist Films Inc. v. Duggan,* 475 F.2d 887 (3rd Cir. 1973), the plaintiff commenced a common law damages action against a prosecutor and his staff for the alleged illegal seizure of a certain film thought to be obscene, but which was subsequently adjudged not to be obscene. In holding the prosecutor to be immune from the plaintiff's suit, the court stated:

> "Ever considering the possible civil rights problem here, no liability can be attributed to the prosecutor in our present case because he was not acting where he clearly had no jurisdiction. He was investigating an alleged violation of the laws of Pennsylvania, which was within his powers and duties, and the actions which he proscribed in this instance were such as he felt necessary to the enforcement of those laws. Obviously, this case in no way approaches the "clear absence of jurisdiction" standard required for possible liability on the part of the prosecutor." 475 F.2d at 889.

In *Atkins v. Lanning,* 556 F.2d 485 (10th Cir. 1977), the plaintiff brought a §1983 action against a prosecutor and his staff to recover damages for an alleged wrongful arrest and imprisonment. In holding the prosecutor and his staff to be immune from the plaintiff's suit, the court stated:

> "The facts of this case clearly demonstrate that the function being performed by the district attorney was that of preparing and presenting a case, or in other words, those judicial functions for which absolute immunity is granted. *Apton v. Wilson,* 165 U.S. App. D.C. 22, 506 F.2d 83 (1974). Some leeway is needed to perform the function of assembling the state's case. *Weathers v. Ebert,* 505 F.2d 514 (4th Cir. 1974).
>
> While it is true that some investigative work is necessarily a prerequisite to the preparation of a prosecuting attorney's case, this does not automatically change the nature of his function to resemble that of a police officer . . . Case law indicates that the denial of immunity to a state prosecutor would doubtless require a gross abuse of the prosecutorial function, such as deliberately concealing evidence proving a defendant's innocence (emphasis added). 556 F.2. at 488.

Applying the criteria articulated above to the case at bar, it is clear that both Judge Lacey and the Third Circuit Court of Appeals were correct in holding that the respondents were clearly acting within the jurisdiction of the prosecutor's office so as to be immune from Portner's §1983 suit. In *Imbler, supra,* the court explicitly recognized that:

> "The function of a prosecutor that most often invites a common-law tort action is his decision to initiate a prosecution, as this may lead to a suit for malicious prosecution if the State's case misfires." 424 U.S. at 421.

Indeed, the activities of the respondents in the instant case were no different from those of the defendants in *Atkins, supra,* in "preparing and presenting a case, or in other words, those judicial functions for which absolute immunity is granted." 556 F.2d at 488. In short, the immunity extended to the respondents for the activities undertaken within the jursidiction of the prosecutor's office presents an "inseparable bar" to Portner's recovery. *Bramlet v. Wilson,* 495 F.2d 714, 716 (8th Cir. 1974).

In his petition for certiorari, Portner relies upon the cases of *Lofland v. Meyers,* 442 F. Supp. 955 (S.D.N.Y. 1977); *Robischaud v. Ronan,* 351 F.2d 533 (9th Cir. 1965); *Littleton v. Berbling,* 468 F.2d 389 (7th Cir. 1972), rev'd on other grounds, 414 U.S. 514 (1972); *Daniels v. Kieser,*

446 F. Supp. 1160 (N.D. Ill. 1978; *Clark v. Lutcher,* 436 F. Supp. 1266, motion for dismissal denied, 415 (M.D. Pa. 1977); *Austin v. Manlin* 433 F. Supp. 648 (E.D. Pa. 1977); *Slavin v. Curry,* 574 F.2d 1254 (5th Cir. 1978); *Walker v. Cahalan,* 542 F.2d 68 (6th Cir. 1976); and *Briggs v. Goodwin,* 569 F.2d 10 (D.C. Cir. 1977); cert. denied (1978) for the proposition that there is confusion among the Circuit Courts of Appeals with regard to the extension of prosecutorial immunity. A careful examination of those cases, however, reveals that Portner's reliance thereon is entirely misplaced. All of those cases in which prosecutorial immunity was not extended were cases in which the prosecutor and his staff acted in either an investigative, administrative or ministerial capacity, or acted clearly outside the jurisdiction of the prosecutor's office. These considerations are not involved in the case *sub judice* and, as such, the cases cited by Portner in his petition are inapposite to the case at bar.

In the instant case, Judge Lacey stated specifically that:

> "I find that, based on the above-mentioned criteria, the alleged acts of the defendant Frankel, as an employee of the prosecutor's office, were not clearly outside the authority of jurisdiction of the office. He was investigating a possible violation of the laws of New Jersey. See *Cambist Films, Inc. v. Duggan,* 475 F.2d 887, 889 (3rd Cir. 1973)."

Judge Lacey also stated that:

> "I find, in similar manner, that the activities of defendants Frankel, Mitzner, Breen and Owen in arresting, transporting, charging and issuing a complaint against plaintiff were each an integral part of the judicial process." See *Imbler v. Pachtman,* 424 U.S. 409, 430 (1976); *Bauers, supra; Tunnell, supra.*

Judge Lacey concluded that:

> "I further find that no cause of action is stated against defendant Asch. No specific act by him is alleged in the complaint. He is being sued in his official capacity as Union County Prosecutor. I have earlier found, however, that the acts of his employees were within the scope of their offices and they were therefore, immune."

Judge Lacey's findings were affirmed without opinion by Judges Rosenn, Hunter and Higginbotham of the Third Circuit Court of Appeals, and said findings should not be disturbed unless they are "clearly erroneous." F.R.C.P. 52 (a); *United States v. United States Gypsum Co.,* 333 U.S. 364 (1948); *Gibson and Odom Electric Co. v. R.F. Ball Construction Co.,* 368 F.2d 182 (3rd Cir. 1966).

Point II

Having determined that the respondents had acted within the jurisdiction of the prosecutor's office and were therefore absolutely immune from Portner's §1983 suit, Judge Lacey was correct in dismissing Portner's complaint for a failure to state a claim upon which relief can be granted.

In *Imbler v. Pachtman,* 424 U.S. 409 (1976), the Supreme Court dealt specifically with the procedure which a District Court should follow when such court is confronted with a case in which a prosecutor is entitled to the extension of immunity. The court stated that:

> "Moreover, *suits that survived the pleadings would pose substantial danger of liability even to the honest prosecutor.* The prosecutor's possible knowledge of a witness' falsehoods, the materiality of evidence not re-

> vealed to the defense, the propriety of a closing argument, and ultimately in every case the likelihood that prosecutorial misconduct so infected a trial as to deny due process are typical of issues with which judges struggle in actions for post-trial relief, sometimes to differing conclusions. The presentation of such issues in a §1983 action often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury. It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials. Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials" (emphasis added). 424 U.S. at 425, 426.

Applying the criteria articulated above to the case at bar, it is clear that Judge Lacey was correct in dismissing Portner's complaint pursuant to F.R.C.P. 12(b) for a failure to state a claim upon which relief can be granted. Once Judge Lacey determined that the respondents had acted within the jurisdiction of the prosecutor's office and were, therefore, absolutely immune from Portner's §1983 suit, it was apparent "beyond a doubt" that Portner could "prove no set of facts in support of his claim which would entitle him to relief." *Conely v. Gibson*, 355 U.S. 41, 45 (1957).

In his petition for a writ of certiorari, Portner relies upon the case of *Helstoski v. Goldstein*, 552 F.2d 564 (3rd Cir. 1977) for the proposition that Judge Lacey erred in dismissing Portner's complaint. A careful examination of

that case, however, reveals that Portner's reliance thereon is entirely misplaced.

In *Helstoski, supra*, the District Court had granted the defendant's motion to dismiss the plaintiff's complaint for a failure to state a claim upon which relief can be granted. The court had relied upon *Imbler, supra*, in holding that the U.S. Attorney's Office enjoyed absolute immunity from the plaintiff's suit. The Third Circuit Court of Appeals reversed the District Court's decision, however, holding that the rationale of *Imbler, supra* did not apply since the allegations contained in the plaintiff's complaint referred to activities which were clearly outside the jurisdiction of the prosecutor's office.

In the instant case, Judge Lacey dealt with the question of whether or not the respondents had acted within the jurisdiction of the prosecutor's office. Judge Lacey determined specifically that the respondents had acted within the jurisdiction of the prosecutor's office so as to be immune from Portner's §1983 suit (*Point I, supra*) and this determination was affirmed by the Third Circuit Court of Appeals. From this, it necessarily follows that the facts of *Helstoski, supra* are entirely different from those in the case at bar, and, as such, *Helstoski, supra* is inapposite to the instant case.

CONCLUSION

In the present case, Portner raises only questions which have already been resolved twice in favor of the respondents and without any impact outside the limits of this case. From the foregoing law and facts, therefore, it is respectfully requested that Portner's petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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Attorneys for Respondents,
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/s/ Daniel L. Martin
DANIEL L. MARTIN

APPENDIX A

LETTER OPINION OF HONORABLE FREDERICK B. LACEY

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
FREDERICK B. LACEY
JUDGE

UNITED STATES
COURT HOUSE
NEWARK, N.J. 07101

ORIGINAL TO THE CLERK

October 12, 1976

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Re: Portner v. Community State Bank & Trust Co.
Civil #76-1208

Counsel:

. I have received and reviewed all submissions on defendants' motion to dismiss and perceive no necessity for oral argument. Accordingly, pursuant to Fed. R. Civ. P. 78, I am determining this motion on the papers before me.

Plaintiff is suing Community State Bank and Trust Company (Bank), Karl Asch, former Union County Prosecutor,

and several individual defendants who were either former employees of the prosecutor's office or of the aforementioned bank for various acts allegedly committed by them which violated plaintiff's fourth, fifth, sixth and fourteenth amendment rights under the Constitution. The action is brought under 42 U.S.C. §1983. Plaintiff alleges that defendant Bank and several bank employees conspired with defendant Frankel, an employee of the prosecutor's office, to entrap plaintiff and to unlawfully record a conversation between him and defendant Fitz, a bank employee, for the purpose of showing that plaintiff attempted to pay an illegal bribe to defendant Fitz. Plaintiff charges defendants Frankel, Breen and Owens, employees of the prosecutor's office, with illegal arrest, assault and battery and unlawful detention. Defendants Mitzner and Frankel, he alleges, advised him that if he entered a guilty plea to a minor offense, he would be charged with a Disorderly Persons violation; if he refused, he and his son would be charged with the commission of a "High Misdemeanor." He alleges that when he refused to enter a guilty plea he was charged with violations of N.J. Stat. Ann. 2A:91-1, 2A:85-14 in retaliation, which complaint was dismissed on October 17, 1975.

The requirement that the alleged conspiracy be under color of state law, is of course, satisfied in that some of the defendants are members of the Union County Prosecutor's office.

The defendants base their motion on two grounds. They argue that the members of the prosecutor's office are immune from suit under section 1983. Because they are immune, the private defendants cannot then be held liable since they allegedly are not conspiring with persons acting under color of state law against whom a valid claim could

be stated. Defendants urge, secondly, that plaintiff fails to allege facts in his complaint with sufficient specificity as to constitute a proper pleading of a §1983 cause of action.

The common-law immunity of a prosecutor is not absolute. It is an immunity derivation from the immunity of judges and does not extend to acts clearly outside the authority or jurisdiction of the office of prosecutor. *United States ex rel. Moore v. Koelzer*, 457 F.2d 892 (3d Cir. 1972); *United States ex rel. Rauch v. Deutsch*, 456 F.2d 1301 (3d Cir. 1972); *Bethea v. Reid*, 445 F.2d 1163 (3d Cir. 1974), *cert. denied*, 404 U.S. 1061 (1972); *Gaito v. Ellenbogen*, 425 F.2d 845 (3d Cir. 1970); *Bauers v. Heisel*, 361 F.2d 581 (3d Cir. 1966) (en banc), *cert. denied*, 386 U.S. 1021 (1967).

In *Kaufman v. Moss*, 420 F.2d 1270 (3d Cir. 1970), plaintiff was convicted by a jury of conspiracy to commit burglary, burglary and larceny in state court. He then brought a suit for damages under the Civil Rights Act against the county district attorney and three other plaintiffs alleging that they had conspired to secure his convictions by the knowing use of perjured testimony. The court found that the district attorney was acting within his jurisdiction in bringing a criminal charge against plaintiff for a claimed violation of state law regardless of the allegation that the subsequent conviction was the result of perjured testimony. The district court's dismissal of the complaint for failure to state a claim, as to the prosecutor, was affirmed because of his immunity from suit. *Id.* at 1273. *See also Bethea v. Reid, supra*, at 1165.

In *Tunnell v. Wiley*, 369 F. Supp. 1260 (E.D. Pa. 1974), where the plaintiff charged that the state prosecutor as well as a newspaper reporter had violated his civil rights by the publishing of a newspaper article allegedly pre-

pared by both, the court found that even if it were shown that the prosecutor aided in the preparation of the article and the article deprived plaintiff of his right to a fair trial, the prosecutor was immune "since the acts alleged were not 'clearly outside the authority or jurisdiction of the office.'" *Id.* at 1270 (quoting *Bauers v. Heisel, supra,* at 590-91).

The first allegedly illegal act asserted by plaintiff is the conspiracy to entrap plaintiff by wiretapping the telephone conversation between him and defendant Fitz. I find that, based on the above-mentioned criteria, the alleged acts of the defendant Frankel, as an employee of the prosecutor's office, were not clearly outside the authority of jurisdiction of the office. He was investigating a possible violation of the laws of New Jersey. *See Cambist Films, Inc. v. Duggan,* 475 F.2d 887, 889 (3d Cir. 1973).

I find, in similar manner, that the activities of defendants Frankel, Mitzner, Breen and Owens in arresting, transporting, charging and issuing a complaint against plaintiff were each "an integral part of the judicial process." *See Imbler v. Pachtman,* 424 U.S. 409, 430 (1976); *Bauers, supra; Tunnell, supra.*

Accordingly, the motion for dismissal of the complaint as to defendant Mitzner is granted and as to defendants Frankel, Breen and Owens on the above mentioned counts. The only count remaining, which I find defendants Frankel, Breen and Owens potentially liable, is that of alleged assault and battery which are acts without the scope of their jurisdiction. The motion for dismissal is denied with respect to this count. This denial is, of course, without prejudice to a renewal of the application as facts develop defining defendants exact roles in the controversy.

I further find that no cause of action is stated against defendant Asch. No specific act by him is alleged in the complaint. He is being sued in his official capacity as Union County Prosecutor. I have earlier found, however, that the acts of his employees were within the scope of their offices and they were therefore immune. The remaining count against any of his employees, the allegation of assault and battery, is outside the scope of their authority and therefore defendant Asch cannot be held liable. The complaint is dismissed as to him.

The remaining defendants, former employees of Community State Bank and Trust Company and the Company itself, are private persons. Even if the alleged claims against them were true, they cannot be held liable in that they were not conspiring with persons acting under color of stage law against whom a valid claim could be stated. *Hill v. McClellan,* 490 F.2d 859, 860 (5th Cir. 1974); *Haldane v. Chagnon,* 345 F.2d 601, 604 (9th Cir. 1965); *Meyer v. Lavelle,* 389 F. Supp. 972, 976 (E.D. Pa. 1975). Indeed, plaintiff fails to allege any acts at all performed by defendants Harris, Croucher, Giordano, Goldberg, Lay, Resnick, Rothschild, Salz, Sladowsky and Zients.

I find, therefore, that plaintiff fails to state a claim against the private defendants as well. Defendants' motion to dismiss the claim as against these defendants is granted.

Submit an appropriate form of order.

Very truly yours,

/s/ Frederick B. Lacey
FREDERICK B. LACEY
United States District Judge

FBL:abw

APPENDIX B

ORDER OF DISMISSAL BY JUDGE LACEY DATED OCTOBER 26, 1976

ORIGINAL FILED
OCT. 26, 1976
ANGELO W. LOCASCIO, CLERK

The matter having been opened to the Court by Sills, Beck, Cummis, Radin & Tischman, P.A., attorneys for defendants Community State Bank and Trust Co., Thomas J. Bader also known as T. J. Bader, Peggy Fitz, Leo Kaplowitz, Lloyd Harris, Arthur R. Croucher, John C. Giordano, Jr., Seymour Goldberg, Theodore Ley, Joseph Resnick, Fred Rothschild, Sanford H. Salz, Max Sladowsky and Bernard Zients upon a motion for dismissal of the complaint pursuant to Rule 12 FRCP and the Court having considered the memoranda of law and supplemental memoranda of law filed by the moving defendants in support of the motion and by the plaintiff in opposition thereto and after due deliberation having been had and the Court having rendered its Letter Opinion dated October 12, 1976 and for good cause shown,

It is on this 26 day of October 1976.

ORDERED, that the complaint of the plaintiff as to the defendants Community State Bank and Trust Co. a New Jersey corporation, Karl Asch, former Union County Prosecutor, Michael J. Mitzner; Thomas J. Bader, also known as T. J. Bader, Peggy Fitz, Leo Kaplowitz, Lloyd Harris, Arthur R. Croucher, John C. Giordano, Jr., Seymour Goldberg, Theodore Ley, Joseph Resnick, Fred Rothschild,

Sanford H. Salz, Max Sladowsky and Bernard Zients be and the same hereby is dismissed with prejudice, and it is further

ORDERED, that the action is also dismissed as to the defendants, Howard Frankel, J. Michael Breen and Glenn Owen with respect to all counts except that relating to the alleged assault and battery and with respect to such count of the complaint, the motion for dismissal is denied without prejudice to a renewal of the application as facts develop defining the exact roles of these defendants in the controversy, and it is further

ORDERED, that the Clerk of the Court shall enter a judgment against the plaintiff in accordance with the provisions of this Order.

/s/ Frederick B. Lacey
FREDERICK B. LACEY
United States District Judge

APPENDIX C

ORDER OF HONORABLE FREDERICK B. LACEY ENTERING JUDGMENT OF DISMISSAL DATED SEPTEMBER 13, 1977

Following selection of a jury and after argument of counsel on the offer of proof by the plaintiff, and the courts ruling thereon, plaintiff's attorney represented to the court that he could not sustain by a preponderance of the evidence the allegations that the defendants, Howard Frankel, J. Michael Breen and Glen Owen, committed an assault and battery upon Nathan Portner, plaintiff, and

It is, therefore, on this 13 day of 1977, ORDERED that that portion of the complaint be and is hereby dismissed with prejudice and without costs.

/s/ Frederick B. Lacey
FREDERICK B. LACEY
United States District Judge

FILED
Sep. 20, 1977
10:15 A.M.
Angelo W. Locascio

APPENDIX D

JUDGMENT ORDER FROM THE THIRD CIRCUIT COURT OF APPEALS DATED JUNE 21, 1978

Argued June 8, 1978

Before ROSENN, HUNTER and HIGGINBOTHAM,
Circuit Judges

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

MAX ROSENN
Circuit Judge

ATTEST:

/s/ Thomas F. Quinn
Thomas F. Quinn, Clerk

Dated: June 21, 1978